

Item # 23
May 18, 2006

ORDINANCE NO.

AN ORDINANCE AMENDING THE CITY CODE TO ADD CHAPTER 2-9A RELATING TO THE MINORITY-OWNED AND WOMEN-OWNED BUSINESS ENTERPRISE PROCUREMENT PROGRAM; AND REPEALING CHAPTER 2-9 OF THE CITY CODE RELATING TO THE MINORITY-OWNED AND WOMEN-OWNED BUSINESS ENTERPRISE PROCUREMENT PROGRAM.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. The City Code is amended to add Chapter 2-9A to read:

CHAPTER 2-9A. MINORITY-OWNED AND WOMEN-OWNED BUSINESS ENTERPRISE PROCUREMENT PROGRAM: CONSTRUCTION.

ARTICLE 1. GENERAL PROVISIONS.

§ 2-9A-1 FINDINGS.

The city council hereby adopts the following findings:

(A) The City of Austin regularly enters into contracts for the procurement of goods and services of many kinds, including for construction. Through its procurement activities, the City has a substantial impact upon the economy of the Austin area.

(B) In 1987, the Economic Development Commission of the City was directed by the city council to review the City's policies and experiences relating to contracting opportunities for minority- and women-owned business enterprises with the City and to suggest revised policies and procedures, if determined necessary.

(C) The Economic Development Commission, through its Small Business and Minority Entrepreneurship Committee, held meetings with representatives of various City departments as well as with interested individuals and organizations, conducted a public hearing and took statements from numerous members of the public.

(D) The Commission found significant disparities between the number of MBEs and WBEs and City contracts awarded to, or subcontracted to, MBEs and WBEs.

(E) The city council found that these disparities resulted from discriminatory practices, thereby impairing the competitive position of MBEs and WBEs with the City.

1 (F) As a result of the work of the Economic Development Commission in 1987,
2 the city council passed an affirmative action program to address the City's role in
3 perpetuating the disparities found in the pattern of contract and subcontract awards to
4 MBEs and WBEs.

5 (G) In 1989, the U.S. Supreme Court, in the case styled City of Richmond v.
6 J.A. Croson Co., held that a local government may redress race discrimination in its
7 contracting activities if it can demonstrate through relevant evidence a compelling
8 governmental interest sought to be remedied, and that the remedies adopted are narrowly
9 tailored to promote that interest.

10 (H) In response to Croson, in 1992 the city council engaged a consultant to study
11 the City's history and contracting practices, the availability of MBEs and WBEs in the
12 City's marketplace, and any disparities in the City's utilization of such businesses. The
13 study was completed in September 1993, and revealed a history in the Austin area of de
14 jure and continuing de facto racial and gender discrimination in the City's marketplace.
15 Further, disparities were found between ready, willing and able MBEs and WBEs and the
16 value of contracts they received from the City.

17 (I) After receipt of the study, the City conducted a series of public hearings at
18 which additional statistical and other evidence of discriminatory practices and acts
19 against MBEs and WBEs was presented.

20 (J) The city council appointed a community-based Disparity Study Ordinance
21 Committee to review the studies and the law, and to draft programmatic changes to the
22 current ordinance. The committee met over several months and recommended certain
23 changes to the current ordinance.

24 (K) Based on the evidence provided, the city council determined that:

25 (1) Prior to the adoption of the City's 1987 ordinance, there were
26 disparities between the number of qualified MBEs and WBEs ready, willing and able to
27 perform services on City contracts and the number of such businesses actually engaged
28 by the City or the City's prime contractors.

29 (2) Despite the implementation of the 1987 ordinance, disparities in the
30 utilization of MBEs and WBEs on City contracts continued to exist.

31 (3) Although the City has undertaken since 1990 a variety of innovative
32 race - and gender-neutral technical assistance, insurance and bonding programs, race- and
33 gender-neutral programs alone have not been sufficient to remedy the effects of
34 discrimination.

1 (4) The evidence continues to demonstrate that MBEs and WBEs have
2 been underutilized in contracting opportunities on City contracts as a result of private
3 sector discrimination.

4 (5) The existence of an exclusionary network in public contracting and
5 other systemic barriers has excluded otherwise qualified MBEs and WBEs from receipt
6 of contracts.

7 (6) Although the City has made substantial progress in eliminating
8 discrimination in its own contracting practices, discrimination exists in private companies
9 that contract on public projects. As a result of this discrimination, the City has been in
10 the past a passive participant in a system of discrimination and, in the absence of
11 programs to eliminate disparity in utilization, would continue to be a passive participant
12 in such a system.

13 (L) The City engaged a consultant to conduct an updated study of availability of
14 minority- and women-owned firms within the Austin area. The 2003 study indicates that
15 there continue to be minority- and women-owned firms available to perform the work of
16 City contracts and subcontracts.

17 (M) In 2003, the City examined various availability and disparity studies
18 conducted for Texas governments. These studies indicate that minority- and women-
19 owned businesses suffer discrimination in access to opportunities in the State of Texas.

20 (N) In 2005, the City engaged a consultant to conduct a further updated study to
21 assess the continued need for this program and whether the program can be more
22 narrowly tailored to meet such need.

23 (O) Based on the evidence from the 2005 study, the City determined that:

24 (1) Despite the City's efforts to create equal opportunities in its
25 marketplace, the evidence indicates that, absent the programs authorized under this
26 ordinance, MBEs and WBEs would be underutilized on City contracts relative to their
27 availability.

28 (2) As set forth in the 2005 study, race- and gender-neutral approaches
29 alone are inadequate to remedy the lingering effects of past discrimination in the City's
30 marketplace.

31 (3) The 2005 study found that the ordinance is narrowly tailored to
32 address the identified current effects of past discrimination and private sector
33 discrimination in the City's marketplace. The study also found that the ordinance reduces
34 the possibility that the City will be a passive participant in discrimination.

1 (4) All of the persons targeted by the ordinance have been affected by
2 disparities in the City marketplace.

3 (5) The ordinance does not unduly burden third parties not eligible for
4 certification under the program.

5 (6) The sunset date contained in the ordinance ensures that the city
6 council will regularly review the program to verify its necessity and that it remains
7 tailored to the specific conditions found in the City's marketplace.

8 (P) Texas law applicable to the City authorizes race- and gender-conscious
9 contracting goals, and if utilized, requires that goals be based on constitutional standards
10 related to the City's marketplace.

11 (Q) Under these circumstances and based on the factual predicate which has
12 been established after careful study and review, the City still has a compelling
13 governmental interest in remedying the racial and gender discrimination that exists in the
14 market segments in which the City does business, and in ensuring that the City is not a
15 participant in such discrimination, thereby allowing all segments of the Austin
16 community to share in the economic benefits of the City.

17 (R) The program adopted herein is narrowly tailored to remedy that
18 discrimination.

19 *Source: 1992 Code Section 5-7-1; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

20 **§ 2-9A-2 POLICY.**

21 It is the policy of the City to provide equal opportunities to all contractors, and to
22 redress the discrimination found in the City's marketplace and in public contracting
23 against minority- and women-owned business enterprises. The City seeks to encourage
24 their full participation in all phases of City procurement activities and to afford them a
25 full and fair opportunity to compete for all City contracts. The purposes and objectives of
26 this chapter are as follows:

27 (1) To ensure that the City is not a passive participant in a discriminatory
28 marketplace.

29 (2) To ensure that the program is narrowly tailored.

30 (3) To provide opportunities for MBEs and WBEs to broaden and enhance their
31 capacities to do business with the City in the area of construction.

32 (4) To provide opportunities for MBEs and WBEs to serve as contractors and
33 subcontractors for the supply of goods and services to the City in the area of construction.

1 (5) To administer this program in a manner consistent with applicable federal
2 and state law.

3 *Source: 1992 Code Section 5-7-2; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

4 **§ 2-9A-3 ESTABLISHMENT OF PROGRAM.**

5 Based upon the foregoing findings and pursuant to the foregoing declaration of
6 policy, there hereby is established a Minority-Owned and Women-Owned Business
7 Enterprise Procurement Program for the City with respect to Construction.

8 The Annual Participation Goals for the Program administered under this Section 2-
9 9A are as follows:

	Construction Participation Goals
African-American Owned Business Enterprises	1.7%
Hispanic-Owned Business Enterprises	9.7%
Asian-American and Native American Owned Business Enterprises	1.5%
Minority-Owned Business Enterprises	12.9%
Women-Owned Business Enterprises	12.6%

10
11 *Source: 1992 Code Section 5-7-3; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

12 **§ 2-9A-4 DEFINITIONS.**

13 For the purpose of this chapter the following definitions shall apply. With the
14 exception of specifically defined terms set forth herein, all words shall have their
15 ordinary and usual meanings. In the event of conflict, the specific definition set out
16 herein shall presumptively, but not conclusively prevail over the ordinary and usual
17 meanings.

18 (1) **ADVERSE DECISION.** An Adverse Decision includes a notice of
19 violation, denial of certification, decertification, sanction or similar action taken by
20 DSMBR, a Contract Awarding Authority, or other City official under the Program with
21 respect to a Firm or Business Enterprise.

22 (2) **AFFILIATE.** A person or entity is an Affiliate of another person or entity
23 that directly or indirectly through one or more intermediaries, controls or is controlled by,
24 or is under common control with, the person or entity. In determining affiliation, the City

1 shall consider all appropriate factors, including common ownership, common
2 management, and contractual relationships. Affiliates must be considered together in
3 determining whether a firm is a MBE/WBE.

4 (3) ANNUAL PARTICIPATION GOALS. The targeted levels established by
5 the city council for the annual aggregate participation of MBEs and WBEs in City
6 contracts with respect to Construction procurement, as set forth in Section 2-9A-3
7 (*Establishment of Program*), and as may be amended from time to time.

8 (4) AUSTIN METROPOLITAN STATISTICAL AREA. The specific area
9 defined by the Census Bureau, which is presently limited to Travis, Williamson, Hays,
10 Bastrop and Caldwell Counties.

11 (5) BID. A complete, properly signed response to a competitive bidding
12 Solicitation issued by the City, submitted on the prescribed forms required by the relevant
13 Contract Awarding Authority, to perform or provide labor, materials, equipment, supplies
14 or services to or for the City for a stated price.

15 (6) BIDDER. A person, Firm or Business Enterprise that submits a Bid in
16 response to a Solicitation. A Bidder may be represented by an agent if such agent
17 provides evidence demonstrating the agent's authority.

18 (7) BROKER. A person or entity that fills orders by purchasing or receiving
19 supplies from a third party supplier rather than out of its own existing inventory, and
20 provides no Commercially Useful Function other than acting as a conduit between his or
21 her supplier and his or her customer.

22 (8) BUSINESS ENTERPRISE or FIRM. A corporation, partnership, sole
23 proprietorship, Joint Venture, joint stock company, professional association or any other
24 legal entity, that is properly licensed and/or otherwise authorized to do business in the
25 State of Texas.

26 (9) CITY and CITY LIMITS. The City of Austin, Texas and its full purpose
27 annexed boundaries, as established by Chapter 90, page 634, Special Laws of Texas,
28 1909, 31st Legislature, as the same may be amended from time to time and as extended
29 by ordinances of the City of Austin enacted subsequent thereto.

30 (10) CITY MANAGER. The person serving as the chief administrative and
31 executive officer of the City, as appointed and serving under Art. V, Section 1 of the
32 Austin City Charter (or any successor provision) and includes his or her designee.

33 (11) CITY MARKETPLACE. The geographic and procurement areas in which
34 the City contracts on an annual basis.

1 (12) **COMMERCIALLY USEFUL FUNCTION.** A Firm is responsible for the
2 execution of a distinct element of the work of the Contract and carries out its
3 responsibilities by actually performing, managing, and supervising the work involved, or
4 fulfilling its responsibilities as Joint Venturer. To determine whether a Firm is
5 performing a Commercially Useful Function, the City will evaluate the amount of work
6 subcontracted, normal industry practices and other relevant factors. In determining
7 whether a MBE/WBE Firm is performing a Commercially Useful Function, the following
8 considerations shall be counted:

9 (a) A MBE/WBE performs a Commercially Useful Function when it is
10 responsible for the work of the Contract and is carrying out its responsibilities by actually
11 performing, managing, and supervising the work involved. To perform a Commercially
12 Useful Function, the MBE/WBE must also be responsible, with respect to materials and
13 supplies used on the Contract, for negotiating price, determining quality and quantity,
14 ordering the material, and installing (where applicable) and paying for the material itself.
15 The determination that a MBE/WBE is performing a Commercially Useful Function will
16 be determined by the amount of work subcontracted, normal industry practices, whether
17 the amount the Firm is to be paid under the Contract is commensurate with the work it is
18 actually performing, and other relevant factors.

19 (b) A MBE/WBE does not perform a Commercially Useful Function if its
20 role is limited to that of an extra participant in a transaction, Contract, or project through
21 which funds are passed in order to obtain the appearance of MBE/WBE participation.

22 (c) Generally, if a MBE/WBE does not perform or exercise responsibility
23 for at least 30 percent of the total cost of its Contract with its own work force, or the
24 MBE/WBE subcontracts a greater portion of the work of a Contract than would be
25 expected on the basis of normal industry practice for the type of work involved, it is not
26 performing a Commercially Useful Function.

27 (13) **COMPLIANCE PLAN:** The plan submitted with the Bid/Proposal detailing
28 the Bidder/Proposer's achievement of the Goals or Subgoals or its Good Faith Efforts to
29 meet the Goals or Subgoals for all elements of the Solicitation, as defined in Section 2-
30 9A-21 (*Pre-Award Compliance Procedures*), subject to the rules established by the
31 relevant Contract Awarding Authority. A Compliance Plan must be submitted with a
32 Bid/Proposal for any City project for which Goals or Subgoals have been established.

33 (14) **CONSTRUCTION.** The construction, repair, rehabilitation, alteration,
34 conversion or extension of buildings, parks, utilities, streets or other improvements or
35 alterations to real property.

36 (15) **CONSULTANT.** A person or Business Enterprise that submits a Proposal
37 to provide professional or nonprofessional services to the City by Contract, and any

1 person who supplies or provides professional or nonprofessional services to the City by
2 Contract.

3 (16) CONTRACT. Includes the entire and integrated binding legal agreement
4 between the City and a Contractor or Consultant to provide or procure labor, materials,
5 equipment, supplies and services to, for or on behalf of the City. Except as otherwise
6 specifically defined in this section, a Contract does not include:

7 (a) awards made by the City with federal/state grant or City general fund
8 monies to a non-profit entity where the City offers assistance, guidance, or supervision on
9 a project or program and the recipient of the grant award uses the grant monies to provide
10 services to the community;

11 (b) sales transactions where the City sells its personal or real property;

12 (c) a loan transaction where the City is acting as a debtor or a creditor;

13 (d) lease and franchise agreements;

14 (e) agreements to use City real property;

15 (f) gifts of materials, equipment, supplies or services to the City;

16 (g) interlocal or intergovernmental agreements between or among
17 political subdivisions; or

18 (h) procurements of commodities or services that are sole source by virtue
19 of intellectual property rights or other exclusive rights and for which there are no other
20 subcontracting opportunities.

21 It is the intent of this Program to complement any federally funded contracts
22 subject to a federally promulgated affirmative action program. In these instances, the
23 City shall administer this Program to complement the federal program.

24 (17) CONTRACT AWARDING AUTHORITY. The City official or department
25 authorized to enter into contracts on behalf of the City.

26 (18) CONTRACTOR. Any person or Business Enterprise that submits a Bid or
27 Proposal to provide labor, goods or services to the City by Contract for profit, and any
28 person who supplies or provides labor, goods or services to the City by Contract for
29 profit.

30 (19) DBE or DISADVANTAGED BUSINESS ENTERPRISE. Defined as
31 provided in 49 Code of Federal Regulation Part 26 or other applicable federal regulations.

1 (20) DSMBR. The City's Department of Small and Minority Business
2 Resources.

3 (21) DIRECTOR. The City official who heads the department which manages
4 the Program authorized by this chapter, and the Director's successor, and the successor
5 agency or department.

6 (22) ECONOMIC DISADVANTAGE. With respect to an individual owner of a
7 Business Enterprise or Firm, Economic Disadvantage means personal net worth equal to
8 or less than \$900,000, which figure shall be (a) indexed annually, beginning January 1,
9 2007, for the Austin Metro Area Consumer Price Index, published by the U.S.
10 Department of Labor, Bureau of Labor Standards and (b) exclusive of the individual
11 owner's equity in (i) a Business Enterprise or Firm seeking certification under this
12 Program, and (ii) the personal residence of the individual owner of such Business
13 Enterprise or Firm.

14 (23) EXPERTISE. Verifiable and demonstrable skills, knowledge or ability to
15 perform in the field of endeavor in which certification is sought by the Business
16 Enterprise as defined by normal industry practices, including licensure where required.

17 (24) FRONT. A business which purports to be a MBE/WBE but that is actually
18 owned, controlled or managed in a manner that is inconsistent with the requirements for
19 certification set forth in this chapter.

20 (25) GOALS. The goals or Subgoals established for a particular Solicitation or
21 Contract, as set forth in Section 2-9A-3 (*Establishment of Program*) and calculated as
22 authorized in Section 2-9A-19 (*Establishment of MBE/WBE Participation Levels for*
23 *Individual Contracts in Construction*).

24 (26) GOOD FAITH EFFORTS. The actions undertaken by a Bidder or Proposer
25 to achieve a MBE/WBE Goal with respect to a Contract. Minimum standards are as set
26 forth in Section 2-9A-21 (*Pre-Award Compliance Procedures*).

27 (27) JOINT VENTURE. An association of two or more persons, or any
28 combination of types of Business Enterprises and persons numbering two or more,
29 proposing to perform a single Contract, in which each Joint Venture partner contributes
30 property, capital, efforts, and skill and/or knowledge, and in which the MBE/WBE is
31 responsible for a distinct, clearly-defined portion of the work of the Contract and whose
32 share in the capital contribution, control, management, risks and profits of the Joint
33 Venture is equal to its ownership interest. A Joint Venture seeking certification pursuant
34 to the Program must have an agreement in writing specifying the terms and conditions of
35 the relationships between the partners and their relationship, risks, and responsibilities
36 under the Contract.

1 (28) LIKE-KIND. For purposes of substitutions of previously designated MBEs
2 and/or WBEs, a MBE for a MBE, if MBE and WBE Goals are used in a Solicitation; a
3 member of a racial or ethnic group for a member of the same racial or ethnic group, if
4 racial or ethnic Subgoals are used in the Solicitation; or a WBE for a WBE.

5 (29) MBE/WBE ADVISORY COMMITTEE. The committee appointed by the
6 city council to serve those functions described in Section 2-9A-13 (*MBE/WBE Advisory*
7 *Committee*). It is composed as set forth in Section 2-1-381 (*Establishment; Meeting*) of
8 the Code.

9 (30) MANUFACTURER. A Firm that operates or maintains a factory or
10 establishment that produces, on the premises, the materials, supplies, articles, or
11 equipment required under the Contract and of the general character described by the
12 specifications.

13 (31) MINORITY-OWNED BUSINESS ENTERPRISE or MBE. A business
14 including, without being limited to, a sole proprietorship, partnership, corporation, Joint
15 Venture, limited liability company, or any other business or professional entity:

16 (a) which is at least 51 percent owned by one or more Minority Persons,
17 or in the case of a publicly owned business, at least 51 percent of all classes of the stock
18 of which is owned by one or more Minority Persons;

19 (b) whose management, policies, major decisions and daily business
20 operations are independently controlled by one or more such Minority Persons;

21 (c) which performs a Commercially Useful Function;

22 (d) the size of which does not exceed the size limits established by rule;

23 (e) doing business in the City's Marketplace for at least three months
24 prior to the date of application for certification;

25 (f) which is certified by the City; and

26 (g) which is Economically Disadvantaged.

27 (32) MINORITY PERSON. A person is a Minority Person, and is rebuttably
28 presumed to be Socially Disadvantaged, if he or she is a citizen of the United States or a
29 lawfully admitted resident alien and a member of one of the following groups:

30 (a) Blacks or African-Americans (persons whose origins are in one of the
31 Black racial groups of Africa);

1 (b) Hispanics (persons whose origins are in Mexico, Central or South
2 America, Spain or any of the Spanish-speaking islands of the Caribbean, regardless of
3 race);

4 (c) Native Americans (persons whose origins are in any of the original
5 peoples of North America);

6 (d) Asian-Americans (persons whose origins are in any of the original
7 peoples of the Far East, Southeast Asia, the islands of the Pacific or the Northern
8 Marianas, or the Indian Subcontinent);

9 (e) other groups, or other individuals, found by the Director pursuant to
10 rule, to be Socially and Economically Disadvantaged, and to have suffered actual social
11 and economic discrimination and decreased opportunities to compete in the City's
12 Marketplace or to do business with the City; and

13 (f) for purposes of contracts funded by other sources, groups found to be
14 eligible for the designation of DBE by such governmental sources.

15 (33) OWNED, MANAGED AND INDEPENDENTLY CONTROLLED. A
16 Business Enterprise or Firm is Owned, Managed and Independently Controlled if one or
17 more Minority Persons or Women who own the requisite interest in or assets of a
18 business applying for certification possess the customary incidents of such ownership,
19 including an equivalent interest in profit and loss, and have contributed an equivalent
20 percentage of capital or equipment and Expertise to the business. Ownership shall be
21 measured as though not subject to the community property interest of a spouse, if both
22 spouses certify in writing that the nonparticipating spouse relinquishes control over his or
23 her community property interest in the subject business (but by doing so is not required to
24 transfer ownership interest or to characterize the property as the separate property of the
25 spouse). The ownership and control of the Firm shall be real, substantial, and continuing
26 and shall go beyond the pro forma ownership of the Firm as reflected in its ownership
27 documents.

28 (34) PROGRAM. The Minority-Owned and Women-Owned Business Enterprise
29 Procurement Program as authorized by this chapter.

30 (35) PROPOSAL. A complete, properly signed response to a Solicitation that, if
31 accepted, would bind the Proposer to perform the resultant Contract.

32 (36) PROPOSER. A person, Business Enterprise or Firm that submits a Proposal
33 in response to a Solicitation. A Proposer may be represented by an agent if such agent
34 provides evidence demonstrating the agent's authority.

1 (37) REGULAR DEALER. A Firm that owns, operates, or maintains a store,
2 warehouse, or other establishment in which the materials, supplies, articles or equipment
3 of the general character described by the specifications and required under the Contract
4 are bought, kept in stock, and regularly sold or leased to the public in the usual course of
5 business. To be a Regular Dealer, the Firm must be an established, regular business that
6 engages, as its principal business and under its own name, in the purchase and sale or
7 lease of the products in question. A person may be a Regular Dealer in such bulk items
8 as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating,
9 or maintaining a place of business if the person both owns and operates distribution
10 equipment for the products. Any supplementing of Regular Dealers' own distribution
11 equipment shall be by a long-term lease agreement and not on an ad hoc or Contract-by-
12 Contract basis. Packers, Brokers, manufacture representatives, or other persons who
13 arrange or expedite transactions are not Regular Dealers.

14 (38) SIGNIFICANT LOCAL BUSINESS PRESENCE. A Firm has a Significant
15 Local Business Presence if it has an established place of business in the Austin
16 Metropolitan Statistical Area, at which one or more of its employees is regularly based.
17 Such place of business must have a substantial role in the MBE's/WBE's performance of
18 a Commercially Useful Function. A location utilized solely as a post office box, mail
19 drop or telephone message center or any combination thereof, with no other substantial
20 work function, shall not be construed to constitute a Significant Local Business Presence.

21 (39) SOCIALLY DISADVANTAGED. A Minority Person or Woman is
22 Socially Disadvantaged if he or she has been subjected to racial, ethnic or gender
23 prejudice or cultural bias within American society because of his or her identity as a
24 member of a group and without regard to individual qualities. Social Disadvantage must
25 stem from circumstances beyond the individual's control.

26 (40) SOLICITATION. A Solicitation means, as the case may be, an invitation
27 for Bids, a request for Proposals, a request for qualifications, a request for quotations, or
28 such other request as defined by the City.

29 (41) SUBCONSULTANT. A person, Firm or Business Enterprise providing
30 professional or nonprofessional services to a prime Consultant if such professional or
31 nonprofessional services are procured or used in fulfillment of the prime Consultant's
32 obligations arising from a Contract with the City, and including every level of
33 subconsulting required to fulfill a Contract with the City.

34 (42) SUBCONTRACTOR. Any person or Business Enterprise providing goods,
35 labor or services to a Contractor if such goods, labor or services are procured or used in
36 fulfillment of the Contractor's obligations arising from a Contract with the City.
37 Subcontractor includes every level of subcontracting required to fulfill a Contract with
38 the City.

1 (43) SUBGOALS. The targeted levels established by the city council for the
2 annual aggregate participation of each group of Minority Persons and Women with
3 respect to Construction procurement, or the targeted levels for the participation of each
4 group of Minority Persons and Women as project participation Goals established
5 pursuant to Section 2-9A-19 (*Establishment of MBE/WBE Participation Levels for*
6 *Individual Contracts in Construction*).

7 (44) USER DEPARTMENT. The department or office of the City that is funding
8 the Contract for the goods or services procured by a Contract and is the consumer of the
9 goods and/or services under Contract on behalf of the City.

10 (45) WOMAN. A person, whether a citizen of the United States or a lawfully
11 admitted resident alien, who is of the female gender.

12 (46) WOMEN-OWNED BUSINESS ENTERPRISE or WBE.. A business
13 including, without being limited to, a sole proprietorship, corporation, partnership, Joint
14 Venture, limited liability company, or any other business or professional entity:

15 (a) which is at least 51 percent owned by one or more Women; or, in the
16 case of a publicly owned business, at least 51 percent of all classes of the stock of which
17 is owned by one or more such Women;

18 (b) whose management, policies, major decisions and daily business
19 operations are independently controlled by one or more such Women;

20 (c) which performs a Commercially Useful Function;

21 (d) the size of which does not exceed size limits established by rule;

22 (e) doing business in the City's Marketplace for at least three months
23 prior to the date of application for certification;

24 (f) which is certified by the City; and

25 (g) which is Economically Disadvantaged.

26 (h) Women who are Minority Persons may choose for the purposes of
27 certification and recertification to be certified as WBEs, MBEs, or both, but cannot be
28 double counted on a Contract to meet a participation Goal.

29 *Source: 1992 Code Section 5-7-4; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

1 **§ 2-9A-5 RACE AND GENDER NEUTRAL MEASURES TO ENSURE EQUAL**
2 **OPPORTUNITY FOR ALL CONTRACTORS.**

3 The City shall develop and use measures to facilitate the participation of all
4 Business Enterprises in City contracting activities with respect to Construction. These
5 measures shall include, but are not limited to:

6 (1) arranging Solicitation times for the presentations of Bids, quantities,
7 specifications, and delivery schedules so as to facilitate the participation of interested
8 Contractors and Subcontractors;

9 (2) segmenting contracts so as to facilitate the participation of Business
10 Enterprises;

11 (3) providing assistance to Business Enterprises in overcoming barriers such as
12 difficulty in obtaining bonding and financing;

13 (4) providing timely information programs on contracting procedures, Bid
14 preparation, and specific contracting opportunities;

15 (5) holding pre-Bid conferences, where appropriate, to explain the projects and
16 to encourage other Contractors to use all available Business Enterprises as
17 Subcontractors;

18 (6) adopting prompt payment procedures, including requiring by Contract that
19 prime Contractors pay Subcontractors (and Consultants pay Subconsultants, as the case
20 may be) within 10 calendar days of receipt of payment from the City and, where
21 appropriate, issuing joint checks to Contractors and Subcontractors (or, as the case may
22 be, to Consultants and Subconsultants);

23 (7) expediting payments and advancing payments to cover start-up and
24 mobilization costs, where appropriate;

25 (8) collecting information from all prime Contractors (or Consultants) on City
26 Contracts detailing the bids received from all Subcontractors (or Subconsultants) for City
27 Contracts and the expenditures to Subcontractors (or Subconsultants) utilized by prime
28 Contractors (or Consultants) on City Contracts;

29 (9) implementing a continuous process for information flow between
30 Contractors, DSMBR, the Purchasing Office, and relevant City departments;

31 (10) reviewing bonding and insurance requirements to eliminate unnecessary
32 barriers to contracting with the City; and

1 (11) referring complaints of discrimination to the appropriate state or federal
2 agency for investigation and resolution, or taking other action as appropriate.

3 *Source: 1992 Code Section 5-7-15; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

4 **§ 2-9A-6 ADOPTION OF RULES.**

5 (A) Purpose and scope. The Director is delegated the authority under Section 2-
6 9A-10 (*Duties of Department of Small and Minority Business Resources*) of this chapter
7 to administer this chapter, including the authority to formulate and adopt such rules and
8 regulations as may be reasonable, necessary and required to assist in the implementation,
9 administration or enforcement of this chapter. Such adoption of rules and regulations
10 shall be conducted according to the standards of uniform practice and procedures set
11 forth in Chapter 1-2 of the Code.

12 *Source: 1992 Code Section 5-7-5; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

13 **ARTICLE 2. PROGRAM MANAGEMENT.**

14
15 **§ 2-9A-10 DUTIES OF DEPARTMENT OF SMALL AND MINORITY**
16 **BUSINESS RESOURCES.**

17 The Minority-Owned and Women-Owned Business Enterprise Procurement
18 Program with respect to Construction shall be administered and executed by a
19 Department of Small and Minority Business Resources, whose Director shall report to the
20 City Manager. The Director has final administrative authority over the operations of the
21 Program. The duties and function of the Department of Small and Minority Business
22 Resources shall include the following:

23 (1) Formulating, proposing and adopting rules and regulations for the further
24 development, implementation and monitoring of the Program, in accordance with the
25 process established in Section 2-9A-6 (*Adoption of Rules*).

26 (2) Assuring that MBEs and WBEs are informed of City contracting
27 opportunities.

28 (3) Providing information and assistance to MBEs, WBEs, and DBEs relating to
29 City procurement practices and procedures and Bid specifications, requirements and
30 prerequisites.

31 (4) Certifying businesses as MBEs, WBEs, and DBEs, maintaining certification
32 records, and ensuring that all City departments have an up-to-date certification register.

1 (5) Reviewing Contractors' achievement of the Goals or documentation of Good
2 Faith Efforts made to comply with the participation Goals for Contracts, and rendering
3 decisions on whether Good Faith Efforts have been sufficient.

4 (6) Working with User Departments to monitor Contracts to ensure prompt
5 payments to MBEs, WBEs, and DBEs and compliance with participation Goals and
6 commitments.

7 (7) Establishing project participation Goals and/or Subgoals in accordance with
8 Section 2-9A-19 (*Establishment of MBE/WBE Participation Levels for Individual*
9 *Contracts in Construction*).

10 (8) Receiving, reviewing, and acting upon complaints and suggestions
11 concerning the Program, and reporting violations of this chapter when such violations
12 occur as provided in Section 2-9A-25 (*Sanctions*).

13 (9) Providing staff support and reports to the MBE/WBE Advisory Committee
14 and forwarding its recommendations to the City Manager, city council and City
15 departments to further the policies and objectives of the Program.

16 (10) Reporting the availability of MBEs, WBEs, and DBEs certified by the City
17 to perform Contracts for the City.

18 *Source: 1992 Code Section 5-7-10; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

19 **§ 2-9A-11 DUTIES OF FINANCE AND ADMINISTRATIVE SERVICES**
20 **DEPARTMENT.**

21 The Purchasing Office of the Finance and Administrative Services Department
22 shall have the following duties and responsibilities with regard to the Program:

23 (1) Maintaining records of:

24 (a) the dollar amounts of awards of prime Contracts to MBEs, WBEs, and
25 DBEs;

26 (b) the actual dollar amounts paid under subcontracts awarded to MBEs,
27 WBEs, and DBEs compared to total dollars paid on Contracts. These payments shall be
28 measured against projected payments or Goals;

29 (c) the total annual expenditures to MBEs, WBEs, and DBEs as a
30 percentage of the total expenditures on all Contracts awarded by the City;

31 (d) monthly reports for all procurements valued in excess of \$5,000,
32 which shall include, at a minimum:

- 1 (i) the number of Contracts and subcontracts awarded to MBEs,
2 WBEs, and DBEs;
- 3 (ii) the total dollar value of Contracts and subcontracts;
- 4 (iii) the percentage of the dollar value of all Contracts and
5 subcontracts awarded during this period that were awarded to MBEs, WBEs, and DBEs;
- 6 (iv) an indication of whether, and the extent to which, the
7 percentage of Contracts and subcontracts awarded met the Annual Participation Goals, if
8 any have been established;
- 9 (v) upon request, the number and identities of MBEs, WBEs, and
10 DBEs awarded Contracts or subcontracts; and
- 11 (vi) department-by-department awards to MBEs, WBEs, and DBEs
12 and expenditures, in comparison to total procurements of each department and the total
13 for the City.

14 (e) For all procurements valued at less than \$5,000, a monthly report
15 which shall include:

- 16 (i) the number of Contracts awarded to MBEs, WBEs and DBEs;
- 17 (ii) the dollar value of Contracts so awarded;
- 18 (iii) the percentage of the dollar value of all Contracts awarded
19 during this period which were awarded to MBEs, WBEs, and DBEs;
- 20 (iv) an indication of whether, and the extent to which, the
21 percentage of Contracts awarded met the Annual Participation Goals; and
- 22 (v) upon request, the number and identities of MBEs, WBEs, and
23 DBEs awarded Contracts.

24 (2) Assisting in the record-keeping functions by obtaining monthly reports from
25 the Public Works Department, Transportation, Planning, and Sustainability Department,
26 and other Construction project management departments on the status of Construction
27 Contract MBE, WBE, and DBE obligations.

28 (3) Compiling an annual report of the last fiscal year's MBE, WBE, and DBE
29 participation in contracting activity by department and for the City as a whole.

30 (4) Compiling and reporting to city council after the end of each fiscal year, the
31 utilization of MBEs and WBEs for that year based on awards of Contracts.

1 (5) Operating, maintaining and enhancing the information systems necessary to
2 assist DSMBR with implementation, administration and enforcement of this chapter.

3 *Source: 1992 Code Section 5-7-11; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

4 **§ 2-9A-12 DUTIES OF PROJECT MANAGEMENT DEPARTMENTS.**

5 The Public Works Department and any other departments or offices of the City
6 which receive appropriate delegation for project management, Contract management,
7 and/or Construction and/or design Contract responsibility shall have the following duties
8 and responsibilities with regard to the Program:

9 (1) assisting the Director with setting project participation Goals and/or
10 Subgoals for Contracts as authorized by Section 2-9A-19 (*Establishment of MBE/WBE*
11 *Participation Levels for Individual Contracts in Construction*) hereof;

12 (2) assuring integration of all vendor lists with the vendor list maintained by the
13 Finance and Administrative Services Department;

14 (3) assisting in the identification of available MBE, WBE, and DBE
15 Subcontractors, and providing other assistance in meeting the Goals;

16 (4) performing other activities to support DSMBR, as set forth in the rules;

17 (5) gathering and maintaining subcontracting data for those Contracts which
18 they manage;

19 (6) submitting subcontracting data to the Finance and Administrative Services,
20 Public Works, and/or such other City departments as may be required by the relevant
21 Contract Awarding Authority, within 15 calendar days of month's end;

22 (7) managing Construction Contracts in a consistent manner to assure Contract
23 compliance in utilization of MBE, WBE, and DBE Subcontractors; and

24 (8) notwithstanding the provisions of this section, no project management
25 department shall have the authority to conduct any activities without express ordinance or
26 rule delegation to such department.

27 *Source: 1992 Code Section 5-7-12; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

28 **§ 2-9A-13 MBE/WBE ADVISORY COMMITTEE.**

29 The MBE/WBE Advisory Committee shall perform those functions as set forth in
30 Section 2-1, Article 38 of the Code.

31 *Source: 1992 Code Section 5-7-13; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

1
2
3 **ARTICLE 3. PROGRAM ELEMENTS.**

4 **§ 2-9A-15 PROGRAM ELIGIBILITY.**

5 (A) Only Business Enterprises that meet the criteria of Minority-Owned
6 Business Enterprises, as defined in Section 2-9A-4 (*Definitions*) or Women-Owned
7 Business Enterprises, as defined in Section 2-9A-4 (*Definitions*) may be certified for
8 participation. The applicant has the burden of production and persuasion by a
preponderance of the evidence.

9 (B) All MBEs and WBEs must be certified prior to participating in the Program.

10 (C) Certifications shall be conducted and records kept by DSMBR or its
11 designee, as approved by the city council.

12 (D) Only a Firm owned by a Socially and Economically Disadvantaged
13 person(s) may be certified as a MBE/WBE.

14 (1) The Firm's ownership by a Socially and Economically Disadvantaged
15 person must be real, substantial, and continuing, going beyond *pro forma* ownership of
16 the Firm as reflected in ownership documents. The owner(s) must enjoy the customary
17 incidents of ownership and share in the risks and profits commensurate with that
18 ownership interest.

19 (2) The contributions of capital or expertise by the Socially and
20 Economically Disadvantaged owner(s) to acquire the ownership interest must be real and
21 substantial. If Expertise is relied upon as part of a Socially and Economically
22 Disadvantaged owner's contribution to acquire ownership, the Expertise must be of the
23 requisite quality generally recognized in a specialized field, in areas critical to the Firm's
24 operations, indispensable to the Firm's potential success, specific to the type of work the
25 Firm performs and documented in the Firm's records. The individual whose expertise is
26 relied upon must have a commensurate financial investment in the Firm.

27 (E) Only a Firm that is managed and controlled by a Socially and Economically
28 Disadvantaged person(s) may be certified as a MBE/WBE.

29 (1) A Firm must not be subject to any formal or informal restrictions that
30 limit the customary discretion of the Socially and Economically Disadvantaged owner(s).
31 There can be no restrictions through corporate charter provisions, by-law provisions,
32 contracts or any other formal or informal devices that prevent the Socially and
33 Economically Disadvantaged owner(s), without the cooperation or vote of any non-
34 Socially and Economically Disadvantaged person, from making any business decision of
35 the Firm, including the making of obligations or the dispersing of funds.

1 (2) The Socially and Economically Disadvantaged owner(s) must possess
2 the power to direct or cause the direction of the management and policies of the Firm and
3 to make day-to-day as well as long-term decisions on management, policy, operations
4 and work.

5 (3) The Socially and Economically Disadvantaged owner(s) may delegate
6 various areas of the management or daily operations of the Firm to persons who are not
7 Socially and Economically Disadvantaged. Such delegations of authority must be
8 revocable, and the Socially and Economically Disadvantaged owner(s) must retain the
9 power to hire and fire any such person. The Socially and Economically Disadvantaged
10 owner(s) must actually exercise control over the Firm's operations, work, management
11 and policy.

12 (4) The Socially and Economically Disadvantaged owner(s) must have an
13 overall understanding of, and managerial and technical competence, experience and
14 expertise, directly related to the Firm's operations and work. The Socially and
15 Economically Disadvantaged owner(s) must have the ability to intelligently and critically
16 evaluate information presented by other participants in the Firm's activities and to make
17 independent decisions concerning the Firm's daily operations, work, management, and
18 policymaking.

19 (5) If state law or City ordinance requires the owner(s) to have a
20 particular license or other credential to own and/or control a certain type of Firm, then the
21 Socially and Economically Disadvantaged owner(s) must possess the required license or
22 credential. If state law or City ordinance does not require that the owner possess the
23 license or credential, the fact that the owner(s) lacks such license or credential is a factor
24 in determining whether the Socially and Economically Disadvantaged owner(s) actually
25 controls the Firm.

26 (6) A Socially and Economically Disadvantaged owner cannot engage in
27 outside employment or other business interests that conflict with the management of the
28 Firm or prevent the owner from devoting sufficient time and attention to the affairs of the
29 Firm to manage and control its day-to-day activities.

30 (F) Only an independent Firm may be certified as a MBE/WBE. An
31 independent Firm is one whose viability does not depend on its relationship with another
32 Firm. Recognition of an applicant as a separate entity for tax or corporate purposes is not
33 necessarily sufficient to demonstrate that a Firm is independent and non-Affiliated. In
34 determining whether an applicant is an independent business, the Director will:

35 (1) Scrutinize relationships with non-Certified Firms in such areas as
36 personnel, facilities, equipment, financial and/or bonding support, and other resources.

1 (2) Consider whether present or recent employer/employee relationships
2 between the Socially and Economically Disadvantaged owner(s) of the applicant and
3 non-Certified Firms or persons associated with non-Certified Firms compromise the
4 applicant's independence.

5 (3) Examine the applicant's relationships with non-Certified Firms to
6 determine whether a pattern of exclusive or primary dealings with non-Certified Firm
7 compromises the applicant's independence.

8 (4) Consider the consistency of relationships between the applicant and
9 non-Certified Firms with normal industry practice.

10 (G) An applicant shall be certified only for specific types of work in which the
11 Socially and Economically Disadvantaged owner(s) has the ability and Expertise to
12 manage and control the Firm's operations and work.

13 (H) Applications for certification shall be on standard forms prepared by
14 DSMBR and adopted by rule, and shall be designed to ensure that the criteria for
15 participation in the Program are satisfied.

16 (I) To ensure that the Program only benefits eligible Business Enterprises, the
17 City shall also certify the eligibility of Joint Ventures involving MBEs and WBEs and
18 non-MBE and WBE Contractors.

19 (J) In lieu of conducting its own certifications, DSMBR by rule may accept
20 formal certifications of WBEs and MBEs by other entities as meeting the requirements of
21 this chapter, provided that DSMBR determines that the certification standards of such
22 entities are comparable to those of the City. DSMBR should strive to coordinate
23 certification activities with other agencies to implement a universal certification process.

24 (K) The certification status of all MBEs and WBEs shall be reviewed on an
25 annual basis by DSMBR or its designee, as approved by city council. The annual review
26 may be conducted through examination of a sworn affidavit of continuing eligibility
27 (including all such attachments as may be required by rule) submitted by the Business
28 Enterprise or Firm seeking certification. MBEs and WBEs are required to seek
29 recertification upon the third anniversary of their initial certification and upon the third
30 anniversary of all subsequent certifications. Failure of the Firm to seek recertification by
31 filing the necessary documentation with DSMBR within 60 calendar days from the date
32 of receipt of written notification from DSMBR shall result in decertification of the Firm.

33 (L) The Director may move to decertify a Business Enterprise that does not
34 continuously meet the criteria set forth in this section.

1 (M) The Director may move to decertify a certified MBE/WBE that repeatedly
2 fails to respond to requests for quotations from Bidders/Proposers who timely solicit
3 participation on a Contract, that repeatedly fails to attend relevant pre-Bid conferences, or
4 that repeatedly fails to honor quotations in bad faith.

5 (N) Decertification by another agency shall create a prima facie case for
6 decertification by the City. The challenged entity shall then have the burden of proving
7 that the City certification should be maintained.

8 *Source: 1992 Code Section 5-7-16; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

9 **§ 2-9A-16 PROCEDURE FOR APPEALING AND PROTESTING ADVERSE**
10 **DECISION.**

11 (A) A Firm that is subject to an Adverse Decision, or has received written notice
12 from the Director or other City official of intent to impose an Adverse Decision, is
13 entitled to appeal such Adverse Decision as set forth herein.

14 (1) Within seven calendar days of the date the Firm receives notice of
15 intent to impose an Adverse Decision, the Firm must file written notice of intent to
16 appeal. Failure to file a written notice of intent within this time waives all rights to
17 appeal or protest the Adverse Decision.

18 (2) DSMBR shall set forth by rule the procedures a Firm must follow to
19 file a written appeal, which appeal must be filed within 21 calendar days of the date the
20 Firm receives notice of intent to impose an Adverse Decision.

21 (3) The Director will determine whether the grounds for an appeal are
22 sufficient, and, if the Director so determines, shall set a date for an appeal hearing,
23 usually within five calendar days. The appeals hearing is an informal meeting, not
24 subject to the Open Meetings Act, and is not an adversarial proceeding. DSMBR shall
25 set forth by rule the persons who may attend an appeal hearing.

26 (4) The Director shall determine on the basis of the information provided
27 at the appeal hearing whether to maintain or deny the Adverse Decision. Such decision
28 by the Director shall be a final decision, subject to protest, and shall be communicated to
29 the Firm in writing within 10 calendar days of the hearing.

30 (B) A Firm that is subject to an Adverse Decision after appeal may protest the
31 Adverse Decision to an independent hearing examiner appointed by the City. The Firm
32 must submit a notice of intent to protest to the Purchasing Office within four calendar
33 days of receipt of the final Adverse Decision, in accordance with the procedures
34 established by the Purchasing Office.

1 (C) If the Adverse Decision is a notice of noncompliance, no appeal is required.
2 The Firm may immediately protest a notice of noncompliance to the Purchasing Office,
3 following the procedures set forth in the applicable Solicitation.

4 (D) A Firm that does not timely appeal and protest an Adverse Decision to
5 decertify the Firm, or whose appeal and protest are unsuccessful, may not reapply for
6 certification until 180 calendar days after the Adverse Decision.

7 *Source: 1992 Code Section 5-7-17; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

8 **§ 2-9A-17 PROCEDURE FOR CHALLENGING CERTIFICATION AS A**
9 **MBE/WBE.**

10 (A) To challenge the eligibility of a Firm that has been certified as a MBE/WBE,
11 a third party may present information under oath that the Firm does not meet the criteria
12 contained in Section 2-9A-15 (*Program Eligibility*). The presumption that the challenged
13 party is eligible shall remain in effect until the Director makes the final determination.

14 (B) The challenge shall be made in writing to the Director and shall include all
15 information relied upon by the challenging party.

16 (C) The Director shall notify the challenged party in writing that the eligibility
17 of his or her Firm has been challenged. This notice shall identify the challenging party
18 and summarize the grounds for the challenge. The notice may also require the challenged
19 party to provide the Director, within a reasonable time, any information requested to
20 permit the Director to evaluate the eligibility of the Firm.

21 (D) The provisions of Section 2-9A-16 (*Procedure for Appealing and Protesting*
22 *Adverse Decision*) shall apply to challenges to certification.

23 *Source: 1992 Code Section 5-7-18; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

24 **§ 2-9A-18 PROGRAM REVIEW.**

25 (A) The Annual Participation Goals shall be expressed as a cumulative Goal for
26 all groups of Minority Persons composed of annual Subgoals for each group of Minority
27 Persons, and a separate Goal for Women, and such participation Goals shall be set forth
28 in Section 2-9A-3 (*Establishment of Program*). The Annual Participation Goals shall be
29 based on the availability of MBEs and WBEs in the City's Marketplace as required by
30 federal and state laws, and shall be expressed as percentages for each group of Minority
31 Persons and Women under each type of Contract. Project participation Goals and
32 Subgoals may be established based on the availability of certified Firms to perform the
33 work of the Contract. Participation Goals shall be reviewed by DSMBR on at least a
34 biennial basis for continued relevance, narrow tailoring, and applicability.

1 (B) The city council shall receive an annual report from the City Manager
2 detailing the City's performance under this chapter, department by department, for the
3 preceding fiscal year. The report shall contain the utilization of MBEs and WBEs based
4 on the audited financial records for the preceding fiscal year, and provide the percentages
5 of MBEs and WBEs on the City's list of certified vendors.

6 (C) The city council will review this report and the City's progress towards
7 eliminating discrimination in its contracting activities and Marketplace and revise the
8 Program as necessary to meet legal and Program requirements. As new evidence
9 becomes available to the City, the city council may revise this chapter if necessary.
10 Annual Participation Goals and Subgoals may be revised for the balance of the term of
11 the Program if the city council finds that:

12 (1) the Program has yet to redress the effects of discrimination in the
13 City's Marketplace against MBEs and WBEs and that in the absence of race- and gender-
14 conscious remedial measures the City would necessarily be a passive participant in a
15 discriminatory marketplace;

16 (2) the Goals and Subgoals are narrowly tailored to redress that
17 discrimination; and

18 (3) the Goals and Subgoals are in compliance with applicable federal and
19 state laws.

20 (D) For ease of Program administration, Solicitations may contain Goals and
21 Subgoals, if applicable, expressed as round numbers, using mathematical rounding
22 principles.

23 (E) Based on the size of the Contract, the type of work of the Contract, and the
24 availability of each group of MBEs to perform elements of the work of the Contract, the
25 City may utilize either the cumulative MBE Goal or the Subgoals for each group of
26 Minority Persons in a Contract Solicitation, or set project MBE/WBE participation Goals
27 as provided in Section 2-9A-19 (*Establishment of MBE/WBE Participation Levels for*
28 *Individual Contracts in Construction*).

29 (F) These Goals and Subgoals shall be in effect from the effective date of this
30 chapter to the effective date of the chapter containing revised Annual Participation Goals
31 established by city council in accordance with Section 2-9A-18(C) (*Program Review*).

32 *Source: 1992 Code Section 5-7-19; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

1 **§ 2-9A-19 ESTABLISHMENT OF MBE/WBE PARTICIPATION LEVELS FOR**
2 **INDIVIDUAL CONTRACTS IN CONSTRUCTION.**

3 (A) The city council recognizes that the availability of MBEs and WBEs is not
4 uniformly present across all areas of Contracting. Therefore, the Director, where
5 appropriate, and pursuant to criteria established by rule, may establish project
6 participation Goals and/or Subgoals for individual Contracts, based on:

7 (1) normal industry practice with respect to Construction, as determined
8 in consultation with the User Department;

9 (2) the availability of at least three certified MBEs or WBEs to perform
10 the functions of those individual Contracts; and

11 (3) the City's utilization of MBEs and WBEs to date, so as to achieve the
12 Annual Participation Goals and Subgoals, if any.

13 (B) For ease of Program administration, Solicitations may contain Goals and/or
14 Subgoals, if applicable, expressed as round numbers, using mathematical rounding
15 principles.

16 (C) The Director shall rely on the information systems operated and maintained
17 by the Finance and Administrative Services Department for the availability percentages
18 used to establish project participation Goals or Subgoals.

19 (D) The Director shall establish by rule a process for Contract awarding
20 authorities to apply for project participation Goals or Subgoals in a timely manner.

21 *Source: 1992 Code Section 5-7-20; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

22 **§ 2-9A-20 COUNTING PARTICIPATION OF MBES AND WBES.**

23 (A) When a MBE/WBE participates in a Contract, only the value of the work
24 actually performed by the MBE/WBE toward MBE/WBE Goals shall be counted towards
25 the overall Goal.

26 (1) The entire amount of that portion of a Contract that is performed by
27 the MBE's/WBE's own forces shall be counted, including the cost of supplies and
28 materials obtained by the MBE/WBE for the work of the Contract, and supplies
29 purchased or equipment leased by the MBE/WBE (except supplies and equipment the
30 MBE/WBE Subcontractor purchases or leases from the prime Contractor or its Affiliate).

31 (2) Notwithstanding clause (1) above, on a single Contract, a MBE that is
32 also a WBE may only be counted once (i.e., toward the MBE Goal or toward the WBE
33 Goal, but not both).

1 (3) The entire amount of fees or commissions charged by a MBE/WBE
2 Firm for providing a *bona fide* service, such as professional, technical, Consultant, or
3 managerial services, or for providing bonds or insurance specifically required for the
4 performance of a Contract, toward MBE/WBE Goals, provided the fee is reasonable and
5 not excessive as compared with fees customarily allowed for similar services shall be
6 counted.

7 (4) When a MBE/WBE subcontracts part of the work of its Contract to
8 another Firm, the value of the subcontracted work may be counted toward Goals only if
9 the MBE/WBE Subcontractor is itself a MBE/WBE. Work that a MBE/WBE
10 subcontracts to a non-MBE/non-WBE Firm does not count toward MBE/WBE Goals.

11 (5) If a Subcontractor contracts part of its work to a MBE/WBE Firm, the
12 value of that work may be counted toward MBE/WBE Goals. Work that a MBE/WBE
13 Subcontractor contracts to another MBE/WBE Firm shall not be counted twice towards
14 the Goal.

15 (B) When a MBE/WBE performs as a participant in a Joint Venture, only the
16 portion of the total dollar value of the Contract equal to the distinct, clearly defined
17 portion of the work of the Contract that the MBE/WBE performs with its own forces and
18 for which it is at risk shall be counted towards MBE/WBE Goals.

19 (C) Only expenditures to a MBE/WBE Contractor that is performing a
20 Commercially Useful Function shall be counted.

21 (D) When a MBE/WBE is presumed not to be performing a Commercially
22 Useful Function as provided in this section, the MBE/WBE may present evidence to
23 rebut this presumption. DSMBR may determine that the Firm is performing a
24 Commercially Useful Function given the type of work involved and normal industry
25 practices.

26 (E) Expenditures with MBEs/WBEs for materials or supplies shall be counted
27 toward MBE/WBE Goals as follows:

28 (1) If the materials or supplies are obtained from a MBE/WBE
29 Manufacturer or Regular Dealer, 100 percent of the cost of the materials or supplies
30 toward MBE/WBE Goals shall be counted.

31 (2) With respect to materials or supplies purchased from a MBE/WBE
32 that is neither a Manufacturer nor a Regular Dealer, count the entire amount of fees or
33 commissions charged for assistance in the procurement of the materials and supplies, or
34 fees or transportation charges for the delivery of materials or supplies required on a job
35 site, toward MBE/WBE Goals only if the payment of such fees are a customary industry
36 practice and such fees are reasonable and not excessive as compared with fees

1 customarily allowed for similar services. Do not count any portion of the cost of the
2 materials and supplies themselves toward MBE/WBE Goals, however.

3 (F) If a Firm ceases to be a certified MBE/WBE during a Contract, the dollar
4 value of work performed under a Contract with that Firm after it has ceased to be
5 certified shall not be counted.

6 (G) In determining achievement of MBE/WBE Goals, the participation of a
7 MBE/WBE Subcontractor shall not be counted until the amount being counted toward the
8 Goal has been paid to the MBE/WBE.

9 *Source: 1992 Code Section 5-7-21; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

10 **§ 2-9A-21 PRE-AWARD COMPLIANCE PROCEDURES.**

11 (A) In all Solicitations for which a Goal has been established for Contracts, the
12 City shall indicate its Goals and/or Subgoals for the use of MBEs/WBEs. All Solicitation
13 and Contract documents for which a Goal or Subgoals have been established shall
14 contain: 1) a description of this chapter and Program; 2) the requirements related to
15 achieving the Goals or Subgoals; 3) if Goals or Subgoals are not achieved, the
16 requirement of documentation of the Bidder's/Proposer's Good Faith Efforts, including
17 the Good Faith Efforts of Minority Persons and Women Bidders/Proposers, to achieve
18 the Goals or Subgoals. When the City has established Subgoals, Bidders/Proposers who
19 do not achieve each of the Subgoals must document Good Faith Efforts to achieve the
20 Subgoals that were not met.

21 (B) Achievement of Goals or Subgoals or documentation of Good Faith Efforts
22 applies to every Contract for which Goals or Subgoals are established. The rules shall
23 prescribe an accelerated and simplified procedure for Contracts solicited and awarded on
24 an emergency basis. The Bidder/Proposer shall submit a compliance plan detailing its
25 achievement of the Goals or Subgoals or its Good Faith Efforts to meet the Goals or
26 Subgoals. The MBE/WBE lists provided by the City to a Bidder/Proposer shall establish
27 the minimum universe from which a Bidder/Proposer may solicit Subcontractors to meet
28 the Goals or Subgoals. The compliance plan shall be due at the time set out in the
29 Solicitation documents, which time shall not be less than four hours after the deadline for
30 submission of Bids.

31 (C) Any agreement between a Bidder/Proposer and a MBE/WBE in which the
32 Bidder/Proposer requires that the MBE/WBE not provide subcontracting quotations to
33 other Bidders/Proposers is prohibited.

34 (D) MBE and WBE Subcontractors must be competitive with non-MBE/non-
35 WBE Subcontractors on price, quality, and delivery. MBEs and WBEs shall respond to
36 relevant requests for quotations.

1 (E) Where the Bidder/Proposer cannot achieve the Goals or Subgoals, its
2 compliance plan shall document its Good Faith Efforts to achieve the Goals or Subgoals.
3 DSMBR will determine whether the Bidder/Proposer has made such Good Faith Efforts.
4 In making this determination, DSMBR will consider, at a minimum, the
5 Bidder/Proposer's efforts to do the following:

6 (1) Soliciting through reasonable and available means the interest of
7 MBEs/WBEs with a Significant Local Business Presence who have the capability to
8 perform the work of the Contract. The Bidder must solicit this interest within sufficient
9 time to allow the MBEs/WBEs to respond to the Solicitation. The Bidder/Proposer must
10 take appropriate steps to follow up initial Solicitations with interested MBEs/WBEs. The
11 Bidder/Proposer must state a specific and verifiable reason for not contacting each
12 certified Firm with a Significant Local Business Presence. For some Contracts, based on
13 criteria to be determined by DSMBR in consultation with the User Department and set
14 forth by rule pursuant to Section 2-9A-6 (*Adoption of Rules*), DSMBR shall make the
15 initial contact with MBEs, WBEs and DBEs, as the case may be, in which case a
16 Bidder/Proposer's efforts under this Subsection (E)(1) shall not be considered.

17 (2) Providing interested MBEs/WBEs with adequate information about
18 the plans, specifications, and requirements of the Contract, including addenda, in a timely
19 manner to assist them in responding to a Solicitation.

20 (3) (a) Negotiating in good faith with interested MBEs/WBEs that
21 have submitted Bids to the Bidder/Proposer. A MBE/WBE that has submitted a Bid to a
22 Bidder/Proposer but has not been contacted within five business days of submission of
23 the Bid may contact DSMBR to request a meeting with the Bidder/Proposer. DSMBR
24 will schedule a meeting between the MBE/WBE and the Bidder/Proposer to facilitate
25 negotiation. If such a meeting does not occur and the MBE/WBE submitting the Bid to
26 the Bidder/Proposer is not selected, the Bidder/Proposer must explain the reason for not
27 selecting the MBE/WBE and provide written documentation supporting the stated reason.
28 Written documentation of negotiation may include the names, addresses, and telephone
29 numbers of MBEs/WBEs that were considered; a description of the information provided
30 regarding the plans and specifications for the work selected for subcontracting; and
31 evidence as to why additional agreements could not be reached for MBEs/WBEs to
32 perform the work.

33 (b) That there may be some additional costs involved in soliciting
34 and using MBEs and WBEs is not a sufficient reason for a Bidder/Proposer's failure to
35 meet the Goals and Subgoals, as long as such costs are reasonable.

36 (4) Not rejecting MBEs/WBEs as being unqualified without sound
37 reasons based on a thorough investigation of their capabilities. The MBE's/WBE's
38 standing within its industry, membership in specific groups, organizations, or

1 associations and political or social affiliations (for example union vs. non-union
2 employee status) are not legitimate causes for rejecting or not soliciting Bids to meet the
3 Goals and Subgoals.

4 (5) It is the Bidder/Proposer's responsibility to make a portion of the
5 work available to MBE/WBE Subcontractors and suppliers and to select those portions of
6 the work or material needs consistent with the available MBE/WBE Subcontractors and
7 suppliers, so as to facilitate meeting the Goals or Subgoals.

8 (6) The ability or desire of a Bidder/Proposer to perform the work of a
9 Contract with its own organization does not relieve the Bidder/Proposer of the
10 responsibility to make Good Faith Efforts. A Bidder/Proposer who desires to self
11 perform the work of a Contract must demonstrate Good Faith Efforts unless the Goals or
12 Subgoals have been met.

13 (7) Bidders/Proposers are not required to accept higher quotes in order to
14 meet the Goals or Subgoals.

15 (F) The following factors may also be considered by DSMBR in determining
16 that a Bidder/Proposer has made Good Faith Efforts. These factors are not intended to be
17 a mandatory checklist, nor are they intended to be exclusive or exhaustive. Other factors
18 or types of efforts may be relevant in appropriate cases:

19 (1) Selecting portions of the work to be performed by MBEs/WBEs in
20 order to increase the likelihood that the Goals or Subgoals will be met. This includes,
21 where appropriate, breaking out Contract work items into economically feasible units to
22 facilitate MBE/WBE participation, even when the Bidder/Proposer might otherwise
23 prefer to perform these work items with its own forces.

24 (2) Making efforts to assist interested MBEs/WBEs in obtaining bonding,
25 lines of credit, or insurance as required by the City or Contractor.

26 (3) Making efforts to assist interested MBEs/WBEs in obtaining
27 necessary equipment, supplies, materials, or related assistance or services.

28 (4) Effectively using the services of Minority Person/Women community
29 organizations; Minority Person/Women Contractors groups; local, state, and federal
30 Minority Person/Women business assistance offices; and other organizations to provide
31 assistance in the recruitment and placement of MBEs, WBEs and/or DBEs. It is the
32 Bidder/Proposer's responsibility to seek guidance from DSMBR on any questions
33 regarding compliance with this section.

34 (5) In determining whether a Bidder/Proposer has made Good Faith
35 Efforts, the performance of other Bidders/Proposers in meeting the Contract may be

1 considered. For example, when other Bidders/Proposers meet the Goals or Subgoals, it
2 may be reasonably questioned whether, with additional reasonable efforts, the apparent
3 successful Bidder/Proposer could have met the Goals or Subgoals. Similarly, if the
4 apparent successful Bidder/Proposer fails to meet the Goals, but meets or exceeds the
5 average MBE/WBE participation obtained by other Bidders/Proposers, this may be
6 evidence that the apparent successful Bidder/Proposer made Good Faith Efforts.

7 (G) The Director shall review the compliance plan prior to award, including the
8 scope of work and the letters of intent from any MBE/WBE Subcontractors within a
9 reasonable time so as not to unduly delay award of the Contract.

10 (1) If the Director determines that the compliance plan demonstrates that
11 the Goals or Subgoals have been achieved, then the Contract Awarding Authority, with
12 the concurrence of the Director, shall recommend award to the city council. For all
13 competitively Bid projects, signed letter(s) of intent between the certified low Bidder and
14 the MBE and/or WBE Subcontractor(s) must be received by the Contract Awarding
15 Authority within three business days of notification of the status as certified low Bidder.
16 For procurements conducted through the request for Proposal or request for qualifications
17 process, no later than after final execution of a professional or nonprofessional services
18 agreement but before the issuance of a notice to proceed, the successful Proposer must
19 deliver signed subcontracts between itself and the MBE and/or WBE Subcontractor(s)
20 and/or Subconsultant(s) for the scope of work reflected in the Proposal as awarded.

21 (2) In the event the applicable Goal(s) or Subgoals have not been
22 achieved, then the Director shall evaluate the Bidder's/Proposer's Good Faith Efforts to
23 achieve those Goals or Subgoals as documented in the compliance plan. The Director
24 shall evaluate the compliance plan based on the criteria established in Subsection (E) of
25 this section. The Director may request clarification in writing of items listed in the
26 compliance plan, provided such clarification shall not include the opportunity to augment
27 listed MBE/WBE participation or Good Faith Efforts.

28 (3) If the Director finds that a Bidder/Proposer did not make sufficient
29 Good Faith Efforts, the Director shall communicate his finding to the Contract Awarding
30 Authority or other appropriate City official. The Director shall recommend to the
31 Contract Awarding Authority that the Bid/Proposal be rejected based on failure to
32 comply with this chapter. The Contract Awarding Authority may reject the Bid/Proposal
33 as not in compliance with this chapter, or may advise the City Manager of additional
34 considerations which may form the basis for accepting the Bid/Proposal as being in the
35 best overall interest of the Program and the City.

36 (4) If the Contract Awarding Authority finds that the Bid/Proposal does
37 not comply with this chapter, a Bidder/Proposer may request a protest hearing. The City
38 Manager has the authority to make the final decision, subject to council action, if

1 required. In determining whether compliance with this section has been met, the City
2 Manager may determine that the effort of the Bidder/Proposer substantially complies
3 with the purpose of this chapter and such determination is in the best interest of the
4 Program and the City.

5 (H) The rejection of Bids/Proposals in conformance with this section does not
6 affect the ability of the Contract Awarding Authority to continue to evaluate and consider
7 the remaining Bids/Proposals that achieve the Goals or Subgoals or demonstrate Good
8 Faith Efforts and to develop a recommendation to city council for award of the Contract.

9 (I) The City purchasing officer may waive minor informalities in the
10 compliance plan. A minor informality is one that does not affect the competitiveness of
11 the Bid/Proposal.

12 *Source: 1992 Code Section 5-7-22; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

13 **§ 2-9A-22 POST-AWARD COMPLIANCE PROCEDURES.**

14 (A) Upon award of a Contract by the city council that includes Goals or
15 Subgoals that are met, the Goals or Subgoals become covenants of performance by the
16 Contractor in favor of the City.

17 (B) The following schedules shall apply:

18 (1) For Construction Contracts, the Contractor must present a work
19 schedule that includes when the MBE/WBE Subcontractors shall be utilized at the job
20 site. This schedule is due on or before the preconstruction meeting with the project
21 manager.

22 (2) For professional and nonprofessional services Contracts, the
23 Contractors or Consultants, as the case may be, must present a written schedule of when
24 the MBE/WBE Subcontractors shall be utilized on the project. This written schedule is
25 due on or before execution of the Contract for services, when the final scope of work is
26 determined.

27 (C) All Contractors shall provide Subcontractor payment information to the
28 Contract Awarding Authority with each request for payment submitted to the City. The
29 Director shall monitor Subcontractor participation during the course of the Contract and
30 shall have reasonable access to all Contract-related documentation held by the
31 Contractor, as established by rule.

32 (D) All Consultants shall provide Subconsultant payment information to the
33 Contract Awarding Authority with each request for payment submitted to the City. The
34 Director shall monitor Subconsultant participation during the course of the Contract and

1 shall have reasonable access to all Contract-related documentation held by the prime
2 Consultant, as established by rule.

3 (E) Prior to Contract closeout by the Contract Awarding Authority, project
4 manager, or Contract manager, the Director shall evaluate the Contractor's fulfillment of
5 the contracted Goals or Subgoals, taking into account all approved substitutions,
6 terminations and changes to the Contract's scope of work. Should the Director find the
7 Contractor to have fulfilled the contracted Goals, the Director shall so state in writing to
8 the Contractor, the Contract Awarding Authority, and the project or Contract manager.
9 Should the Director find the Contractor has not fulfilled the contracted Goals or
10 Subgoals, the Director shall provide the reasons for such conclusion and recommend an
11 appropriate Adverse Decision in writing to the Purchasing Office with copies to the
12 Contractor, the Contract Awarding Authority, the project manager, and/or the Contract
13 manager.

14 (F) Notice of appeal from an Adverse Decision under Subsection (E) must be
15 filed within 14 calendar days from the date of receipt of the finding with the Purchasing
16 Office, including any written documentation to demonstrate how the Contractor or
17 Consultant, as the case may be, has complied with the contracted Goals or Subgoals. The
18 Purchasing Office shall hold a hearing within 15 calendar days of receipt of notice of
19 appeal on whether the Contractor or Consultant has complied with the contracted Goals
20 or Subgoals. The Contract Awarding Authority, the project or Contract manager, the
21 Director, and the Contractor or Consultant shall participate. The Purchasing Office shall
22 make a finding in writing within 15 calendar days after the close of the hearing date,
23 along with a recommendation for resolution of the Adverse Decision, if appropriate.

24 *Source: 1992 Code Section 5-7-23; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

25 **§ 2-9A-23 POST-SUBMISSION CHANGES TO THE COMPLIANCE PLAN.**

26 (A) The Contractor cannot make changes to the compliance plan or substitute
27 MBE/WBE Subcontractors listed in the compliance plan without the prior written
28 approval of the Director. Unauthorized changes or substitutions shall be a violation of
29 this chapter, and may constitute grounds for rejection of the Bid or Proposal or cause
30 termination of the executed Contract for breach, and/or subject the Bidder/Proposer to
31 Contract penalties or other sanctions.

32 (B) All requests for changes or substitutions of the Subcontractors listed in the
33 compliance plan shall be made to the Director in writing, and shall clearly and fully set
34 forth the basis for the request. A Contractor shall not substitute a Subcontractor or
35 perform the work designated for a Subcontractor in the compliance plan with its own
36 forces unless and until the Director approves such substitution in writing. A Contractor
37 shall not allow a substituted Subcontractor to begin work until both the Director and the

1 City's project manager overseeing the completion of the Contract have approved the
2 substitution.

3 (C) The facts supporting the request must not have been known nor reasonably
4 should have been known by the parties prior to the submission of the compliance plan.
5 Bid shopping is prohibited. The Contractor must meet with the Subcontractor and
6 negotiate with the Subcontractor to resolve the problem. If requested by either party, the
7 City shall facilitate such a meeting. Where there has been a mistake or disagreement
8 about the scope of work, the MBE/WBE can be substituted only where an agreement
9 cannot be reached for a reasonable price for the correct scope of work.

10 (D) Substitutions of the Subcontractor shall be permitted only on the following
11 bases:

- 12 (1) unavailability after receipt of reasonable notice to proceed;
- 13 (2) failure of performance;
- 14 (3) financial incapacity;
- 15 (4) refusal by the Subcontractor to honor the Bid or Proposal price;
- 16 (5) mistake of fact or law about the elements of the scope of work of a
17 Solicitation where a reasonable price cannot be agreed;
- 18 (6) failure of the Subcontractor to meet insurance, licensing or bonding
19 requirements; or
- 20 (7) the Subcontractor's withdrawal of its Bid or Proposal.

21 (E) The Director's decision whether to permit or deny the proposed substitution,
22 and the basis therefore, will be communicated to the parties in writing by the Director
23 within seven business days.

24 (F) Where the Contractor has established the basis for the substitution to the
25 satisfaction of the Director, he shall make Good Faith Efforts to fulfill the compliance
26 plan. The Contractor may seek the assistance of DSMBR in obtaining a new MBE/WBE
27 Subcontractor. To fulfill the compliance plan, the Contractor shall first make Good Faith
28 Efforts to substitute with a Like-Kind MBE/WBE Subcontractor. If a competitive
29 agreement considering price, quality and delivery cannot be reached with such
30 Subcontractor, the Contractor shall make Good Faith Efforts to obtain other MBE/WBE
31 substitutes so as to meet the Goals or Subgoals, in conformance with Section 2-9A-21
32 (*Pre-Award Compliance Procedures*). If the Goals or Subgoals cannot be reached and
33 Good Faith Efforts have been made to meet the Goals, the Contractor may substitute with
34 a non-MBE/non-WBE.

1 (G) When a MBE/WBE is included in a Bidder's compliance plan and is
2 decertified or becomes ineligible to participate on contracts after issuance of a
3 Solicitation but prior to award, or subsequent to award of a Contract, the participation of
4 such a Business Enterprise may be counted as provided in the rules.

5 (H) If the City, as owner under the Contract, requires the substitution of a
6 Subcontractor listed in the compliance plan, the Contractor shall undertake Good Faith
7 Efforts to substitute with a Like-Kind MBE/WBE Subcontractor. If a competitive
8 agreement considering price, quality and delivery cannot be reached with such
9 Subcontractor, the Contractor shall make Good Faith Efforts to obtain other MBE/WBE
10 substitutes so as to meet the Goals or Subgoals, in conformance with Section 2-9A-21
11 (*Pre-Award Compliance Procedures*). If the Goals or Subgoals cannot be reached and
12 Good Faith Efforts have been made to meet the Goals, the Contractor may substitute with
13 a non-MBE/non-WBE.

14 (I) If a Contractor plans to hire a Subcontractor on any scope of work that was
15 not previously disclosed in the compliance plan, the Contractor shall obtain the approval
16 of the Director to modify the compliance plan and must make Good Faith Efforts to
17 ensure that MBEs/WBEs have a fair opportunity to Bid on the new scope of work.

18 *Source: 1992 Code Section 5-7-24; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

19 **§ 2-9A-24 POST-AWARD CHANGES TO THE SCOPE OF WORK.**

20 (A) Changes to the scopes of work shall be documented by the Contract
21 Awarding Authority at the time they arise, to establish the reasons for the change and to
22 document resulting changes in the applicable Goals for the Contract.

23 (B) For Construction Contracts, where there is a change order that requires work
24 beyond the scope of trades originally required to accomplish the project, then it is the
25 duty of the Contractor to fulfill the Goals or to make Good Faith Efforts to fulfill the
26 Goals for that change order. Change orders that do not alter the type of trades originally
27 required to accomplish the project may be undertaken using the Subcontractors and
28 suppliers already under Contract to the Contractor.

29 (C) For professional and nonprofessional services Contracts, when there is a
30 change to the scope of work which requires new, additional services beyond the services
31 originally required to accomplish the project, then it is the duty of the Proposer to fulfill
32 the applicable contracted Goals or Subgoals or to make Good Faith Efforts to fulfill the
33 applicable contracted Goals or Subgoals for that change. Changes to the scope of work
34 which do not alter the type of services as originally required to accomplish the project
35 may be undertaken using the Subconsultants, Subcontractors and suppliers already under
36 Contract to the Proposer.

1 Source: 1992 Code Section 5-7-25; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.

2 **§ 2-9A-25 SANCTIONS.**

3 (A) The following violations of this chapter are unlawful and may result in
4 sanctions:

5 (1) providing false or misleading information to the City in connection
6 with an application for or challenge to certification, recertification or decertification as a
7 MBE/WBE;

8 (2) providing false or misleading information to the City in connection
9 with submission of a Bid, responses to requests for qualifications or Proposals, Good
10 Faith Efforts documentation, post-award compliance, or other Program operations;

11 (3) substituting MBE/WBE Subcontractors without first receiving
12 approval for such substitutions; or

13 (4) committing any other violations of the provisions of this chapter.

14 (B) A Bidder, Proposer, Contractor, Subcontractor or applicant for certification
15 is subject to being barred, suspended, or deemed non-responsible in future City
16 Solicitations and contracts for a period up to five years, if it is found to have:

17 (1) provided false or misleading information in connection with an
18 application for certification or recertification;

19 (2) provided false or misleading information in connection with the
20 submission of a Bid or Proposal or documentation of Good Faith Efforts, post-award
21 compliance, or other Program operations;

22 (3) failed to fulfill contractual Goals or Subgoals and thereby materially
23 breached the Contract; or

24 (4) repeatedly failed to comply in good faith with substantive provisions
25 of this chapter.

26 (C) When the Director, the Contract Awarding Authority, or any other City
27 official identifies a violation of this chapter, such violation must be referred to the
28 Purchasing Office for evaluation of proper sanctions. Such evaluation shall include
29 consultation with the Law Department prior to any recommendation for sanctions.

30 (D) Department procedures shall be promulgated and conducted by the
31 Purchasing Office of the Finance and Administrative Services Department.

1 (E) A MBE/WBE that repeatedly and knowingly refuses to honor Bid or
2 Proposal prices is subject to being decertified by the Director, after notice and hearing.

3 (F) Nothing in this chapter shall be deemed to prevent the city attorney from
4 seeking criminal sanctions at municipal court or referring the matter to other appropriate
5 law enforcement authorities, as authorized by this section.

6 (G) Where appropriate and lawful, the City may by Contract impose a fixed sum
7 as a penalty to be paid by the Bidder/Proposer for an unexcused failure to meet the Goals
8 or Subgoals or to otherwise comply with the Program. In addition, the City may deduct
9 from retainage any difference in subcontract prices from substitutions not approved by
10 the City.

11 (H) In addition to other sanctions available to the City, the violation of any
12 provision of this chapter may be included as an incident of breach in each Contract.

13 (I) For federally funded contracts administered pursuant to federal regulations,
14 sanctions may be imposed as provided therein.

15 *Source: 1992 Code Section 5-7-26; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

16 **§ 2-9A-26 SUNSET PROVISION.**

17 This chapter of the Code expires at the close of business December 31, 2010,
18 unless prior to that date the city council votes to reauthorize the Program.

19 *Source: 1992 Code Section 5-7-27; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

20 **§ 2-9A-27 INTERPRETATION.**

21 Nothing in this chapter is intended, nor should it be construed, in the interpretation
22 of this chapter or its application, as authorizing violations of the competitive Bidding
23 statutes and professional services solicitation statutes promulgated by the Texas
24 legislature or federal constitutional standards as enunciated by the U.S. Supreme Court.

25 *Source: 1992 Code Section 5-7-28; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

26 **§ 2-9A-28 SEVERABILITY.**

27 If any section, subsection, clause, or provision of this chapter is held to be invalid
28 by a court of competent jurisdiction, the remainder of this chapter shall not be affected by
29 such invalidity.

30 *Source: 1992 Code Section 5-7-29; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

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PART 2. Chapter 2-9 (*Minority-Owned And Women-Owned Business Enterprise Procurement Program*) of the City Code is repealed.

PART 3. This ordinance takes effect on _____, 2006.

PASSED AND APPROVED

_____, 2006 §
 §
 §

Will Wynn
Mayor

APPROVED: _____
David Allan Smith
City Attorney

ATTEST: _____
Shirley A. Gentry
City Clerk